SUPREME COURT, U.S.
FILED
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

ENRIQUE CHAVEZ-GALVAN

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT (97-3448)

PETITION FOR WRIT OF CERTIORARI

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30pp

QUESTION PRESENTED

Should this Court exercise its supervisory power to require the Circuit Courts to establish measurable factors to consider in recognition of a "buyer seller" relationship that would, once identified, exclude a criminal Defendant from conviction on a 21 U.S.C.§846 conspiracy.

THE PARTIES

The caption in this case contains the
me of all parties.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (97-3448)

REFERENCE TO OPINIONS DELIVERED BELOW

1. Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the 11th Circuit in this case.

Opinions Below

1. The opinion of the Eleventh Circuit denying the suggestion for rehearing en banc can be found as (Appendix A).

2. The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at United States v. Galvan, __ F.3d __ (Appendix B).

STATEMENT OF JURISDICTION

The Court of Appeals denied a timely petition for rehearing/suggestion for rehearing En Banc on June 29, 1999. (See Appendix A) The judgment of the United States Court of Appeals for the Eleventh Circuit (Court of Appeals) was entered on April 12, 1999. (See Appendix B)

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below

Appellant Enrique Chavez-Galvan (hereinafter "Galvan") was indicted on May 7, 1997 (R-1-1) and by superseding indictment on May 20, 1997 (R-1-23), and charged with violation of 21 U.S.C. §846, conspiracy to possess with intent to distribute cocaine and marijuana. Count II was a forfeiture count.

Galvan was arraigned May 30, 1997, and pleaded not guilty. (R-1-36). The Government filed an information to establish prior convictions on July 2, 1997. (R-1-54).

Galvan was tried July 8-9, 1997, in the United States District Court for the Northern District of Florida, the Hon. Lacey A. Collier presiding. Case No. 3:97-CR-49/LAC. Galvan was found guilty on July 9, 1997. (R-1-57, 58, 60).

Galvan filed his written objections to the Government's 21 U.S.C. §851 information on November 12, 1997. (R-1-82). Sentencing was held November 12, 1997. (R-1-83). The sentencing court adopted the Presentence Investigation Report and found Galvan's Total Offense Level at 36, and his Criminal History Score as III. The Court sentenced Galvan to 264 months' imprisonment and 10 years' supervised release. (R-1-83). The forfeiture

count was dismissed on the Government's motion. (R-1-83, S.T. 12-13).

Galvan filed a timely notice of appeal. (R-1-85).

On April 12, 1999 the Eleventh Circuit Court of Appeals affirmed the conviction and vacated and remanded in part for re-sentencing based on the erroneous application of a 3B1.1 (a) role enhancement. Galvan has not been resentenced by the District Court and anticipates filing a motion to stay that proceeding until a ruling from this Court issues.

Reasons for Granting the Writ

Galvan asserted that the evidence as adduced at trial, even viewed in the light most favorable to the Government, was insufficient to sustain a conviction for violation of 21 U.S.C. §846, conspiracy to possess with intent to distribute cocaine and

marijuana.

On appeal Galvan contended and the evidence tended to show that he had no more than a buyer-seller relationship with others and was therefore not guilty of a conspiracy. In rejecting this argument, the Eleventh Circuit Court of Appeals held that "[t]he evidence presented at trial showed Appellant did not merely sell drugs to the other alleged co-conspirators, but also worked with them in obtaining the drugs. For example, Appellant and another co-conspirator together purchased a station wagon so as to the [sic] enable them to obtain larger shipments of drugs from Texas."

The issue of "buyer-seller" relationships is worthy of review by this Court to ensure conformity within the circuits as to what constitutes buyer-seller relationships, thereby excluding unwarranted and

unconstitutional broad brush convictions for conspiracy.

Although the majority of the Circuit Courts of Appeal have recognized the existence of buyer-seller relationships as exclusionary of participation in conspiracies, there is no standard uniform definition, factors or elements which constitute a buyer-seller relationship which are identifiable and measurable. Due to the large volume of drug conspiracy cases, all of which involve the buying and selling of drugs, such uniformity and clarity is needed throughout the Circuits so that criminal defendants are not left to the whim and subjective perception of the jurists deciding their fate, often times reacting from their gut.

Buyer-Seller Relationship.

Galvan first asserts that the evidence adduced at trial only showed, at most, that a

buyer-seller relationship existed between himself and members of the Borce conspiracy.

It is well established that the existence of a buyer-seller relationship alone does not furnish the requisite evidence of a conspiratorial agreement. United States v. Wright, 63 F.3d 1067, 1072 (11th Cir. 1995); United States v. Brown, 872 F.2d 385, 391 (11th Cir. 1989).

The evidence, even when reviewed in the light most favorable to the prosecution, established that Petitioner supplied marijuana and cocaine to Tim Borce and his organization. It does not establish that Petitioner was a member of the conspiracy.

The Borce drug-distribution conspiracy was well advanced before Petitioner allegedly entered upon the scene. Petitioner's role was that of a supplier to an already-existing drug conspiracy. Mickey Walker, Borce's

coconspirator, testified that he and Borce initially obtained marijuana from a Mexican named Abel, but later switched to Petitioner as their supplier. (Tr. II - 47). Borce testified that he approached the Petitioner as a source of cocaine and marijuana. (Tr. III - 100-05). Borce stated that he was the leader of the Pensacola drug-distribution apparatus. (Tr. III - 142-43).

Most tellingly, all the alleged co-conspirators agreed that Walker and Borce approached Petitioner and asked to buy cocaine; however, Walker and Borce rejected the cocaine Petitioner allegedly offered them, because of its poor quality. (Tr. II - 77-78, Tr. III - 103). Nothing in the record established the buyer-seller relationship as clearly as the instance where the Borce conspirators rejected the drugs which Petitioner allegedly attempted to sell them.

If the group was a single conspiracy with Petitioner as the leader[1] or organizer, as the Government contended, then Borce and Walker would not have rejected the cocaine.

A buyer-seller relationship does not furnish the requisite evidence of a conspiratorial agreement. United States v. Wright, supra. Clearly, the relationship between Defendant and the Borce organization was that of buyer-seller, not co-conspirators. Even when the evidence is viewed in the light most favorable to the Government, with all reasonable inferences and credibility choices made in the Government's favor the Eleventh

---

[1]As previously noted, the Eleventh Circuit Court of Appeals has remanded the case for resentencing on the role enhancement issue wherein it held, "Although this evidence might be sufficient to establish Appellant played a managerial or supervisory role in the conspiracy, it is insufficient to support the district court's finding that Appellant was an organizer or leader of the conspiracy." (See Appendix B)

Circuit should have found that Petitioner was not a member of the Borce conspiracy. Accordingly, Petitioner's conviction should have been reversed.

ARGUMENT

The much larger picture, however, is that there does not exist in the Eleventh Circuit or others, any identifiable definition elements, or factors to be considered regarding a buyer-seller relationship so as to aid the courts and parties in understanding what constitutes a buyer-seller relationship. In fact, at present, a Circuit Court's recognition or the existence of nonexistence of a buyer-seller relationship is left to the subjective whim of the panel of jurists assigned a particular case. In the instant case, the Eleventh Circuit Court of Appeals held that a single instance of alleged cooperation, which is susceptible of innocent

explanation, was sufficient to establish an overt act in furtherance of the drug conspiracy.(See 11th Cir. Opinion attached herein) By contrast the Seventh Circuit holds that evidence of a conspiracy as opposed to a buyer-seller relationship requires (among other factors) a prolonged cooperation between the parties. United States v. Berry, 133 F.3d 1020 (7th Cir. 1998). The Eighth Circuit holds that a witness' testimony that she heard the defendant discuss an unsuccessful trip with a third party to purchase drugs, coupled with defendant's drug sales to others, did not establish that the defendant was a member of the drug conspiracy. United States v. Jensen, 141 F.3d 830 (8th Cir. 1998). The Ninth Circuit has held that a defendant who drove the automobile during a drug transaction was not shown to have knowingly participated in the drug conspiracy, where the evidence did

not exclude the possibility of an innocent explanation for the defendant's activity. United States v. Wiseman, 25 F.3d 862 (9th Cir. 1994). Conspiracy convictions in drug cases are numerous and the consequences often grave for criminal defendants. This Court's recognition of what constitutes a buyer-seller relationship and identification of the necessary elements and factors to be considered by the Circuit Courts is needed just as it was regarding departure guidelines, Koon v. United States, 518 U.S. 81, 116 S.Ct. 2035, 135 L.Ed 2d 392 (1996). At present there are no articulable factors outlined within the Circuits that the respective Courts should consider in recognition of mere "buyer-seller" relationships.

CONCLUSION

WHEREFORE, for the above cited arguments and citations to authority, Petitioner prays

that this Court will grant his Petition for Certiorari, hear the case on its merits, and grant the relief sought.

Respectfully submitted,

/s/_____

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
FILED
JUNE 29, 1999

THOMAS K. KAHN
CLERK

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 97-3448

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ENRIQUE CHAVEZ-GALVAN
Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: BIRCH, BLACK AND BARKETT, Circuit Judges.

PER CURIAM:

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of conviction of the said District Court and sentence imposed in this cause be and the same is hereby AFFIRMED in part; VACATED in part; and that this cause be and the same is hereby REMANDED to said District Court for re-sentencing in accordance with the opinion of this Court.

Entered: April 12, 1999
For the Court: Thomas K. Kahn, Clerk

By: /s/ Matt Davidson

ISSUED AS MANDATE: July 15, 1999

APPENDIX B

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT
FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
APRIL 12, 1999
THOMAS K. KAHN
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NO. 97-3448
Non-Argument Calendar

D. C. Docket No. 3:97-CR-49-1-LAC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ENRIQUE CHAVEZ-GALVAN,

Defendant-Appellant.

Appeal from the United States District Court

for the Northern District of Florida

Before BIRCH, BLACK AND BARKETT, Circuit Judges.

PER CURIAM:

Appellant Enrique Chavez-Galvan was convicted after a jury trial on one count of conspiracy to possess with intent to distribute cocaine and marijuana, in violation of 21 U.S.C. §846. The district court sentenced Appellant to 264 months' imprisonment. On appeal, Appellant argues: (1) the statements and testimony of the cooperating witnesses should be stricken; (2) the evidence is insufficient to support his conviction; (3) the district court erred by attributing 1,907 kilograms of marijuana to him at sentencing; and (4) the district court erred by giving him a four-level enhancement in his base offense level under U.S.S.G. §3B1.1(a) for being an organizer or leader of

the conspiracy.

In support of his argument that the statements and testimony of the cooperating witnesses should be stricken as being in violation of the 18 U.S.C. §201(c) prohibition on offering anything of value for a witness's testimony, Appellant relies on the Tenth Circuit's panel decision in *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998). This argument is without merit. Not only did the Tenth Circuit vacate the panel decision and arrive at a contrary ruling upon rehearing the case en banc, *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999) (en banc), but this Court also has rejected the *Singleton* panel decision. *United States v. Lowery*, 166 F.3d 1119, 1124 (11th Cir.

Appellant next argues the evidence is

insufficient to support the jury's finding that he was a member of the charged conspiracy. He contends the evidence at most established a buyer-seller relationship. We disagree. The evidence presented at trial showed Appellant did not merely sell drugs to the other alleged coconspirators, but also worked with them in obtaining the drugs. For example, Appellant and another coconspirator together purchased a station wagon so as to enable them to obtain larger shipments of drugs from Texas.[1]

As to Appellant's third argument, we review the district court's determination of the drug quantity attributable to a defendant for clear error. *United States v. Frazier*,

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[1]Appellant also presents a sufficiency of the evidence argument premised on the success of his *Singleton* argument. As Appellant's *Singleton* argument fails, so too does his related sufficiency of the evidence argument.

89 F.3d 1501, 1506 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 1719 (1997). There is sufficient evidence in the record to establish that Appellant is responsible for at least 1,000 kilograms of marijuana. This figure results in the same base offense level as that arrived at by the district court. *See* U.S.S.G. §133 F.3d 831, 843 (11th Cir. 1998). U.S.S.G. §3B1.1(a) provides: "If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels." The Commentary to §3B1.1 provides:

> In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed

> right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.
>
> U.S.S.G. §3B1.1, comment. (n.4).

Appellant argues the evidence shows no more that he bought and sold drugs and therefore does not establish he was an organizer or leader of the conspiracy. In response, the Government contends the evidence is sufficient to support the enhancement as it shows Appellant: (1) located cocaine and marijuana suppliers in Texas and arranged trips to pick up the drugs; (2) assisted in the purchase of a station wagon for transporting the drugs from Texas to Florida; (3) escorted a coconspirator on the first trip to Texas and sent an escort with him on the second trip; (4) continued to organize the efforts to

acquire marijuana from Texas for four months after the head coconspirator was arrested; and (5) fronted drugs to members of the conspiracy. Although this evidence might be sufficient to establish Appellant played a managerial or supervisory role in the conspiracy, it is insufficient to support the district court's finding that Appellant was an organizer or leader of the conspiracy.

AFFIRMED IN PART, VACATED IN PART AND REMANDED FOR RE-SENTENCING.

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April 12, 1999

RE: 97-3448-II USA v. Chavez-Galvan
DC DKT NO.: 97-00049 3-CR-1-LAC

CC: Susan Graham James

CC: Randall J. Hensel

CC: Lacey A. Collier

CC: Administrative File

CC: William Wagner